Sunbelt Rentals, Inc. *and* International Union of Operating Engineers Local 139, AFL–CIO. Cases 18–CA–236643, 18–CA–238989, and 18–CA–247528

March 1, 2021

NOTICE AND INVITATION TO FILE BRIEFS

BY CHAIRMAN RING AND MEMBERS KAPLAN, EMANUEL, AND RING

On May 13, 2020, Administrative Law Judge Michael A. Rosas issued a decision in the above-captioned case, finding, among other things, that the Respondent violated Section 8(a)(1) of the Act when its attorney interviewed two employees in the course of preparing its defense without fully complying with the safeguards set forth in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). In *Johnnie's Poultry*, the Board recognized that an employer charged with violating the Act needs to conduct an investigation to prepare its defense, and such investigations may include interviewing employees. Because asking employees questions about events that have given rise to unfair labor practice allegations creates a risk of interference with Section 7 rights, the Board sought to strike a balance between the employer's need to prepare its defense and employees' rights under the Act. In doing so, the Board established a number of safeguards that employers must observe when undertaking such questioning:

> [T]he employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

146 NLRB at 775. The Board characterized its decision as extending to employers "the privilege of ascertaining the necessary facts from employees," and added: "When an employer transgresses the boundaries of these safeguards, he loses the benefits of the privilege." Id. In other words, *Johnnie's Poultry* establishes a per se standard: failure to abide by any one of the foregoing safeguards results in a finding that the employer has violated the Act.

The judge found that the Respondent's attorney failed to comply with *Johnnie's Poultry* by failing to inform one employee that his testimony would not affect his employment (i.e., that "no reprisal will take place") and the other that his participation was voluntary. Both employees appear to have been aligned with the Respondent. One filed a decertification petition with the Board in March 2019; the other was formerly a manager, and the judge found that, as a manager, he had unlawfully threatened employees in April 2019 that union organizing would be futile. Each testified that he considered the Respondent's attorney to represent his interests before the Board.

In its exceptions brief, the Respondent asks the Board not to apply *Johnnie's Poultry* and instead consider "the totality of the circumstances, including the purpose of the interview, the entire statement made to the employee, and the scope of the questioning."[1] The Respondent argues that there would be no violation under this standard because the employees "made it clear that they knew there would be no repercussions." Since we are not free to decline to apply controlling precedent, we construe the Respondent's exceptions as contending that *Johnnie's Poultry* should be overruled. The Respondent is not alone in this. Although the per se standard of *Johnnie's Poultry* is longstanding and has provided useful bright-line guidance for employee interviews, several courts of appeals have disagreed with it. See *Tschiggfrie Properties, Ltd. v. NLRB*, 896 F.3d 880, 888 (8th Cir. 2018) (rejecting *Johnnie's Poultry* and citing cases in which the Second, Fifth, and Seventh Circuits have done likewise). Although the Board adheres to its nonacquiescence policy with respect to circuit court decisions that conflict with Board law, the value of a clear and predictable standard is called into question when multiple appellate courts decline to apply it and themselves apply varying standards.

To aid in the consideration of this issue, the Board now invites the parties and interested amici to file briefs addressing the following questions:

1. Should the Board adhere to or overrule *Johnnie's Poultry*?

2. If the Board overrules *Johnnie's Poultry*, what standard should the Board adopt in its stead? What factors should it apply in determining whether an employer has violated the Act when questioning an employee in the course of preparing a defense to an unfair labor practice allegation? Should the Board apply a "totality of the circumstances" standard? Even if some of the *Johnnie's*

[1] As authority for these factors, the Respondent cites *A & R Transport, Inc. v. NLRB*, 601 F.2d 311, 313 (7th Cir. 1979).

Poultry safeguards should be dispensed with, are there any that, if breached, should continue to render such questioning unlawful per se?

Briefs not exceeding 25 pages in length shall be filed with the Board in Washington, D.C., on or before April 5, 2021. The parties may file responsive briefs on or before April 20, 2021. No other responsive briefs will be accepted.[2] The parties and *amici* shall file briefs electronically by going to www.nlrb.gov and clicking on "eFiling." Parties and *amici* are reminded to serve all case participants. A list of case participants may be found at http://www.nlrb.gov/case/18-CA-236643 under the heading "Service Documents." If assistance is needed in E-filing on the Agency's website, please contact the Office of Executive Secretary at 202-273-1940 or Executive Secretary Roxanne Rothschild at 202-273-2917.

Dated, Washington, D.C. March 1, 2021

Marvin E. Kaplan, Member

William J. Emanuel Member

John F. Ring Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MCFERRAN, dissenting.

Today, the majority asks whether to overrule the Board's long-standing *Johnnie's Poultry* doctrine,[1] which requires an employer to provide certain assurances when the employer interrogates employees to prepare a defense in an unfair labor practice hearing. The Board has consistently adhered to this clear, bright-line rule for more than 56 years, balancing the legitimate interest of employers in preparing a defense with the need to protect employees from interference in exercising and vindicating their statutory rights under the National Labor Relations Act. Citing judicial decisions that reject *Johnnie's Poultry*, the majority announces that it will reconsider the rule and invites briefing on possible alternatives.[2] But there is no compelling reason to go down this path. Congress gave the Board the authority to adopt reasonable standards construing the Act, and *Johnnie's Poultry* is a clear example of a such a standard, as its longevity demonstrates.[3]

Section 8(a)(1) of the Act makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise" of their protected rights.[4] Because employees depend on employers for their livelihoods, whenever an employer interrogates an employee about statutorily-protected activity, the potential for coercion arises. See *Standard-Coosa-Thatcher*, 85 NLRB 1358 (1949) (prohibiting employer interrogation); *Blue Flash Express*, 109 NLRB 591 (1954) (replacing strict prohibition on any employer interrogation with a totality of the circumstance test).[5] When the interrogation occurs in the context of a pending unfair labor practice proceeding, and the government has accused the employer of violating employees' statutory rights, the potential for coercion is notably higher. In those circumstances, the employer has potentially demonstrated hostility to employee rights, and also has a clear desire to avoid legal liability. A vulnerable employee will be particularly disinclined to oppose the employer's obvious interests or to stand up for his own statutory rights in such intimidating circumstances.[6]

Interrogation prior to an unfair labor practice hearing also impacts the Board's ability to enforce the Act effectively and to protect the integrity of its processes. Interrogated employees might feel pressured to tell employers what they want to hear, or be hesitant to cooperate with the Board's investigation or testify truthfully at hearing, if

[2] The judge further found that the Respondent violated Sec. 8(a)(1), (3), and (5) following the Union's March 2018 certification by coercing employees, bargaining in bad faith, and eventually eliminating the bargaining unit. The Board finds no need for supplemental briefing regarding any of these issues.

[1] 146 NLRB 770 (1964) enf. denied 344 F.2d 617 (8th Cir. 1965).

[2] Although I see no need to reconsider *Johnnie's Poultry*, my colleagues take the appropriate step of seeking public input first. That said, I disagree with my colleagues' assertion that the Respondent has actually asked the Board to reverse *Johnnie's Poultry*. Rather, the Respondent's position here misstates the Board's governing law, which my colleagues treat as a request to revise our law accordingly.

[3] See generally *Johnnie's Poultry—Still Kosher*, 61 Lab. Law J. No. 2, 2010 WL 11230492 (2010)

[4] 29 U.S.C. §158(a)(1).

[5] While the Board has taken a more flexible approach to employer interrogation in other circumstances, it has always recognized the intrinsic danger that interrogation poses to employees' statutory rights, and the corresponding principle that the Board must take into account that employees' economic dependence on their employers leaves them uniquely vulnerable to more subtle forms of coercion. See, e.g., *Struksnes*, 165 NLRB 1062, 1062 (1967) ("[I]n our view any attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his Section 7 rights.").

[6] See *National Treasury Employees Union v. Federal Labor Relations Authority*, 774 F.2d 1181, 1192 (D.C. Cir. 1985) ("When an employer interviews an adverse witness rather than his own or even a neutral witness, common sense suggests that the situation carries a greater potential for intimidation or coercion.")

that is contrary to the employer's interest. In a case involving employer access to Board witness statements, the Supreme Court has explained that the "danger of witness intimidation is particularly acute with respect to current employees . . . over whom the employer, by virtue of the employment relationship, may exercise intense leverage."[7]

Of course, employers also have a legitimate interest in ascertaining facts to present a defense to an unfair labor practice allegation.[8] Accordingly, the Board has struck a careful balance that allows employers to interview employees to prepare an unfair-labor-practice hearing defense, but that also requires compliance with "specific safeguards designed to minimize the coercive impact of such employer interrogation." Id. at 775. Those safeguards limit the scope of the interrogation to ensure that it goes no farther than necessary to meet the employer's legitimate need. They also make clear to employees that their statutory rights remain protected: employees must be affirmatively informed of the purpose of the interview, that their participation in the interview is voluntary, and that no reprisal will take place.

Johnnie's Poultry, then, reflects a careful balance—appropriate to a situation with high coercive potential—between the need to protect vulnerable employees from coercion and the need to permit employers to prepare a defense to unfair labor practice allegations. This approach also establishes a simple standard that is easy for employers to satisfy, easy for the General Counsel to enforce, and easy for the Board to apply.[9] Several reviewing courts have specifically acknowledged these and other virtues of the *Johnnie's Poultry* standard.[10]

The principal criticism made by the circuit courts that have rejected *Johnnie's Poultry* has been that it infringes on employer free speech rights. See e.g., *Tschiggfrie Properties, Ltd. v. NLRB*, 896 F.3d 880, 888 (8th Cir. 2018). That concern is misplaced. It is "well established that an employer, in questioning his employees as to their union sympathies, is not expressing views, argument, or opinion within the meaning of Section 8(c) of the Act, as the purpose of an inquiry is not to express views but to ascertain those of the person questioned."[11]

In other cases where courts have disagreed with *Johnnie's Poultry*, the scope of the disagreement is relatively minor and does not undermine the utility of the Board's bright-line rule.[12] As the Sixth Circuit has noted, "even courts that have followed the 'all the circumstances' approach have not disagreed with the basic premise that

[7] *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 240 (1978) (exempting witness statements in pending unfair labor practice proceedings from disclosure requirements under the Freedom of Information Act); see also *NLRB v. National Survey Service, Inc.*, 361 F.2d 199, 206 (7th Cir. 1966) (rejecting employer's claim that the Board's ex parte investigation in a representation proceeding violated its due process rights, stating that "[i]f an employee knows that statements made by him will be revealed to an employer, he is less likely, for fear of reprisal, to make an uninhibited and non-evasive statement, a circumstance complicating a determination of the actual facts in a labor dispute.").

[8] The U.S. Court of Appeals for the District of Columbia Circuit has described the Board's traditional approach, even before *Johnnie's Poultry*'s as "assum[ing] that interrogation of employees concerning their union activities is, of itself, coercive, but that fairness to the employer requires that a limited amount of such questioning be permitted." *Joy Silk v. NLRB*, 185 F. 2d 732, 743 (D.C. Cir. 1950), cert. denied 341 U.S. 914 (1951).

[9] See e.g., *Cook Paint & Varnish Co v. NLRB*, 648 F.2d 712, 733 (D.C. Cir. 1981) (dissenting opinion). Dissenting from the majority decision rejecting the need for safeguards for interrogations about a grievance scheduled for arbitration, Judge Skelly Wright described the principal virtue of *Johnnie's Poultry* as its "simplicity and enforceability."

The Board and the courts have frequently recognized the value of bright-line rules in other contexts, noting that they "promote certainty, predictability, and administrative efficiency, even if their application in a particular case may seem unjust or un-wise." *Williams Energy Services*, 336 NLRB 160, 160 (2001), citing *Cleveland Indians Baseball Co*., 333 NLRB 579 (2001); *NLRB v. Maryland Ambulance Services*, 192 F.3d 430, 434 (4th Cir. 1999) ("While bright-line rules . . . may run the risk of being over or under-inclusive in their coverage, it is generally recognized that the certainty and stability such a rule affords outweighs any harm done when the rule is applied evenly.")

My colleagues, too, have endorsed bright-line rules in other circumstances. See e.g., Joint Employer Status Under the National Labor Relations Act, Final Rule, 85 Fed. Reg. 11184, 11199 (Feb. 26, 2020) (requiring actual exercise of control over employment terms to establish joint-employer status is "a bright-line rule that will make it easier for the Board, and ultimately for the courts, to reach consistent decisions across a range of individual cases."); *The Boeing Co.*, 365 NLRB No. 154, slip op. at 4 (2017) (creating new categories of always-lawful and always-unlawful work rules will provide "greater clarity and certainty for employees, employers and unions.").

[10] See *Coosa-Thatcher Carpet Yarn Div., Inc. v. NLRB*, 691 F.2d 1133, 1141 (4th Cir. 1982) ("Board's per se rule simply recognizes that a significant risk of coerciveness arises when an employer questions employees about a union without informing them that they may, with impunity, decline to respond."); *UAW v. NLRB*, 392 F.2d 801, 809 (D.C. Cir. 1967) (recognizing that "a delicate balance must be achieved between the employer's need to prepare adequately for pending unfair labor practice cases and the inherently coercive nature (in violation of an employee's Section 7 rights) of employer interrogation of employees during a labor dispute.")

[11] *Struksnes Construction,* supra, 165 NLRB at 1062, fn. 8 citing *Martin Sprocket & Gear Co. v. NLRB*, 329 F.2d 417, 420 (5th Cir. 1964); *NLRB v Minnesota Mining & Mfg. Co*., 179 F 2d 323, 326 (8th Cir. 1950). Section 8(c) of the Act provides that the "expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . , if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. §158(c).

[12] A leading labor-law treatise observes that "the courts, by and large, have considered the *Johnnie's Poultry* standards appropriate in determining whether questioning of employees is coercive, but, except for the Fourth Circuit, they have declined to apply the rules in a per se fashion. Several circuits have applied a "totality of the circumstances" test to determine whether employee rights were violated." American Bar Association, Section of Labor & Employment Law, *The Developing Labor Law*, Ch. 6, Sec. II.B.2.C.(3) (John E. Higgins, Jr. ed., 7th ed. 2019).

cooperation in such investigations must also be voluntary." *Beverly Health & Rehabilitation Services, Inc. v. NLRB*, 297 F.3d 468, 477 (6th Cir. 2002).[13]

For decades, the Board has declined to adopt a "totality of the circumstances" approach[14] in considering the coerciveness of an employer's interrogation of an employee during preparation for an unfair labor practice hearing, instead finding that specific assurances are necessary to adequately protect worker's statutory rights in this potentially intimidating environment.[15]

The Board must carefully consider the cost of abandoning these traditional safeguards, in terms of its ability to effectively protect statutory rights, while properly accommodating legitimate employer interests. The danger here is that the real-world consequences of revisiting *Johnnie's Poultry* will be harmful. While employers may gain more latitude to interrogate employees, employees will be less aware and less confident of their rights, and thus less likely to exercise them, and the Board will have diminished ability to protect employee rights and to preserve the integrity of its processes. Because I do not believe it is necessary to revisit this settled area of law,[16] I dissent from today's notice and invitation to file briefs.

Dated, Washington, D.C. March 1, 2021

Lauren McFerran, Chairman

NATIONAL LABOR RELATIONS BOARD

[13] Further, when applying their own gloss on *Johnnie's Poultry*, courts have generally not explained why the Board is not free to establish safeguards for interrogation in that context. The Supreme Court has made clear that "[b]ecause it is to the Board that Congress entrusted the task of 'applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms,'" the Board "necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500 (1978), quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945). In turn, the "rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality." Id. It seems apparent that the rule of *Johnnie's Poultry* is clearly rational and consistent with the Act, despite the judicial criticism it has encountered. It is, of course, not enough (as the Supreme Court has observed) that judges "would have formulated a different rule had [they] sat on the Board." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990).

[14] It merits notice that, in other situations, my colleagues have criticized such an approach as "simply a cloak for agency whim." *General Motors*, 369 NLRB No. 127, slip op. at 6 (2020) quoting *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004).

[15] Cf. *NLRB v. Lorben Corp*., 345 F.2d 346 (2d Cir. 1965) (Judge Friendly, dissenting) ("An agency receiving over 14,000 unfair labor practice charges a year…ought not be denied the right to establish standards, appropriate to the statutory purpose, that are readily understandable by employers, regional directors and trial examiners, and be forced to determine every instance of alleged unlawful interrogation by an inquiry covering an employer's entire union history and his behavior during the particular crisis and to render decisions having little or no precedential value. . . .")

[16] It is certainly possible that the rationale for *Johnnie's Poultry* requires a more robust explanation, and even long-standing Board doctrines need occasional refinement. For instance, the Fourth Circuit, in affirming *Johnnie's Poultry*, suggested that it may be preferable to consider the failure to comply with the safeguards as a rebuttable presumption that the interrogation was coercive. *Coosa-Thatcher Carpet Yarn Div., Inc. v. NLRB*, supra, 691 F.2d at 1141. While, as noted above, I do not share my colleagues' concerns with the appropriateness of our current test, I will, of course, consider all responses to this invitation with an open mind.